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There is No Such Thing as a Safe Space

Author

Stanley Fish, **Winning Arguments: What Works and Doesn't Work in Politics, the Bedroom, the Courtroom, and the Classroom**, New York, NY: Harper Collins, 2017, 214 + ix pp, pb, £9.99.

INTRODUCTION

Stanley Fish draws the Introduction of *Winning Arguments* to an emphatic close. He tells us that 'argument is everywhere, argument is unavoidable, argument is interminable'.[1] He also declares that 'argument is all we have'.[2] He means by this that the arguments we advance successfully deliver the world to us 'in a particular shape'.[3] He also tells us that, if we are to argue successfully, we must do so in ways that are 'context-specific'.[4] These claims concerning argument will be familiar to anyone who has read Fish's earlier writings on law and literature. The idea that what we call 'fact' is theory-laden bulks large in these works. To embrace this idea is to take the view that our concepts and the arguments in which they feature shape our understanding of the circumstances in which we find ourselves.[5] Fish has also given currency to the idea that we owe the concepts and arguments that we use to make sense of our circumstances to interpretive communities. On his account, interpretive communities are authoritative, intersubjective reference points in controversies that concern the objects to which their members devote attention.[6] This is because the individuals (eg, lawyers) who make up such a community share a sense of relevance as to what is at stake in the fields that concern them.[7] Consequently, they (rather than a text or the intentions of its author(s)) are the centre of interpretive gravity in the contexts effectively constituted by the understandings that unite them.

While these points will be old hat to anyone familiar with Fish, *Winning A*rguments brings into sharp focus a set of assumptions at work in his mind that have great relevance to law. Fish tells us that he is 'making an argument about argument and its relationship to the human condition'.[8] He develops this point by identifying argument as 'the medium we swim in, whether we want

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[1] S.E. Fish, *Winning Arguments: What Works and Doesn't Work in Politics, the Bedroom, the Courtroom, and the Classroom* (New York, NY: Harper Collins, 2017) 3.
[2] *ibid*.
[3] *ibid*, 16.
[4] *ibid*, 7.
[5] C. Kutz, 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law (1993) 103 *Yale LJ* 997, 1014-1015.
[6] S.E. Fish, *Is There A Text in This Class? The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 1980) ch 13.
[7] S.E. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke University Press, 1989) 364 (on 'thinking like a lawyer').
[8] Fish, n 1 above, 2.

to or not'.[9] He also tells us that the purpose of argument is not to achieve a consensus that wins the support of all rational people. Rather, it affords a means to prevail at the expense of others: eg, where the 'adherents of different partisan frameworks' of thought seek to triumph at their opponents' expense.[10] In this example, Fish drives home the message that aggression lies at the heart of argument. He reinforces this message when he states that 'words are aimed, they are sent out in volleys, … they are sprayed around like bullets'.[11]

These are features of *Winning Arguments* and Fish's writings more generally that call to mind the jurisprude Carl Schmitt. For Schmitt described politics as a struggle between friends and foes – to which he added the point that the upshot could be a conflict that ultimately takes a violent and perhaps even exterminatory turn.[12] Readers will search *Winning Arguments* in vain for chilling statements of this sort. However, Fish pursues a theme that has affinities with Schmitt's account of friend-versus-foe politics. He tells us that argument may sweep away the politico-legal frameworks, or normative worlds, we make and inhabit and that invest our lives with a sense of significance and security. On this view, we are always vulnerable to the depradations of those who could prevail at our expense by means of argument. Thus there is no 'oasis' or 'safe space' that is entirely secure (whether it be a society-wide politico-legal framework or the spaces that people share in intimate or other relations with others).[13] This essay will not seek to gainsay this view. However, there are reasons for thinking that it may be possible to establish a normatively appealing, enduring, but not entirely safe politico-legal space. We will (in the penultimate section of this essay) explore this possibility by reference to Britain's legal order (and the liberal political philosophy that is, on the analysis below, at work within it). As we will see, Fish (notwithstanding the fact that he has declared himself to be 'against liberalism generally') lends support to the claim that it may be possible to establish and maintain such a space.[14] To demonstrate that this is the case, we will subject not just *Winning Arguments* but many of his other works to close analysis. We will also explore their significance by drawing on the jurisprudential contributions of Herbert Hart and Ronald Dworkin and a recent analysis of human linguistic capacity offered by the philosopher Charles Taylor. Our focus will be on argument and the interpretive communities in which Fish identifies it as unfolding. There are reasons for thinking that Fish (notwithstanding the close attention he has devoted to interpretive communities in legal and other contexts) has underestimated their practical significance. This is because these communities and the language in which their concerns find expression embody and make possible the accumulation

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[9] *ibid.*

[10] *ibid*, 62.

[11] *ibid*, 23.

[12] C. Schmitt, *The Concept of the Political* (London: University of Chicago Press, expanded edn, 2007 [1932]) 26-27 and 29.

[13] Fish, n 1 above, 3 and 120. ('Safe space' is a term that has gained a range of associations (eg, trigger warnings and microaggressions) that make it a source of live controversy. However, Fish uses it to denote liberal politico-legal frameworks that shield those who inhabit them from the adverse consequences of argument. See S.E. Fish, *The Trouble with Principle* (London: Harvard University Press, 2001) 189. See also 214-215 and 297.

[14] S.E. Fish, *How Milton Works* (Cambridge, MA: Belknap Press, 2001) 562. For more general discussion of Fish's antipathy towards liberalism, see M. Robertson, *Stanley Fish on Philosophy, Politics and Law: How Fish Works* (Cambridge: Cambridge University Press, 2014) 81 et seq.

of social capital (cooperative modes of interaction that find expression in dispositions, practices, and institutions).

STANLEY FISH ON ARGUMENT

Clearly, there is, on Fish's analysis, no escape from argument (since it is everywhere). But while he takes this view, he recognises that '[m]any people do not wish to believe this' and seek to identify 'something that will neutralise argument'.[15] Fish finds in the aspiration he describes 'the desire for another world' and adds that it would take the form of 'a safe oasis'.[16] Moreover, he argues that people could only enjoy the benefits of such an oasis by fastening on a body of 'truth' capable of bringing argument to an end.[17] Fish dismisses this possibility in terms that make apparent his commitment to the theory-ladenness of fact. He tells us that we have no prospect of apprehending 'the unvarnished truth'.[18] An 'intermediary layer' (our conceptual schemes) always interposes itself between us and 'the real' for which we go in search.[19] Thus we must accept that the most argument can 'achieve' is persuasion rather than transcendence - in the form of movement into the realm of 'the *really* real' (to use Richard Rorty's phrase).[20] Persuasion can, on Fish's account, bring into existence a 'bounded argument space': eg., a legal system within which a limited range of arguments will have authoritative force.[21] Fish tells us that the existence of these spaces demonstrates that we can use language to build a particular 'this' (eg., the British constitution) rather than a 'that'.[22] However, language gives us the power to unsettle existing certainties: eg., by opening up a 'space of doubt' that we then fill with 'alternative readings' of our circumstances.[23] Thus we should recognise that, while the sources of authority we possess may talk to us in 'the accents of infallibility', they are contingencies (rhetorical achievements) vulnerable to the assaults of argument.[24] He adds that these assaults can result in 'change' and 'reversal' within a bounded argument space or the 'transformation' of such a context.[25]

Fish illustrates his position on argument-as-rhetoric by reference to numerous examples, legal and non-legal. The US Supreme Court's response to same-sex marriage provides him with an example of change in the law. He notes that 'deeply entrenched' hostility to same-sex unions (that made appeal to 'nature or natural morality') came under strain in *Lawrence v Texas*.[26] By a 6-3 majority, the Court in *Lawrence* identified a prohibition on sodomy in the state of Texas

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[15] Fish, n 1 above, 3.
[16] *ibid*, 3 and 13.
[17] *ibid*, 3.
[18] *ibid*, 197.
[19] *ibid*, 3 and 197.
[20] *ibid*, 20, and R. Rorty, *Philosophy as Cultural Politics: Philosophical Papers, Volume IV* (Cambridge: Cambridge University Press, 2007) 20.
[21] Fish, n 1 above, 129.
[22] *ibid*, 16.
[23] *ibid*, 24.
[24] A. Macintyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1985, 2nd edn) 17 (noting J.M. Keynes' declaration that 'victory' in argument goes to those who can 'speak with the greatest appearance of clear, undoubting conviction' and can use 'the accents of infallibility').
[25] Fish, n 1 above, 71 and 82.
[26] *ibid*, 68-69. See also *Lawrence v Texas* 539 US 558 (2003).

as unconstitutional. For the majority, Kennedy J stated that the Court could not justify its decision by reference to 'deep convictions' that (in the minds of their proponents) have the status of 'ethical and moral principles'.[27] Rather, it staked out a position according to which 'liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex'.[28] Fish adds that the Supreme Court applied this statement of general principle to same-sex marriage in *Obergefell v Hodges* (when it identified such unions as lawful).[29] The process of change that culminated in *Obergefell* also illustrates a point Fish makes about legal precedents. He identifies those who draw a sharp distinction between binding and persuasive legal authorities as naïve. On his account, precedents are always vulnerable to processes of argument that may undercut their authority. For this reason, we should think of them as 'binding *if* persuasive'.[30] On this view, precedents are persuasive if they sustain practical arrangements (eg, a tolerant model of human association) that judges (the relevant interpretive community) consider appealing. Thus *Obergefell* and *Lawrence* present us with a struggle that has to do with the pursuit (by rhetorical means) of political ends (human association in particular forms) within a bounded argument space (the US constitution).

Fish contrasts this politico-legal view of law with the 'liberal' account he finds in Reginald Rose's teleplay and film, *Twelve Angry Men*.[31] Rose presents law as a set of procedures that make it possible to respond justly to matters of plain (as opposed to theory-laden) fact. This view of law finds expression in 'the story of a jury' (in a criminal trial) whose members must 'get at the truth about a matter of life and death'.[32] Their task is to determine whether a young man is guilty of murdering his father with a knife. One witness has told them that the boy shouted 'I'll kill you' at his father.[33] They are also aware that the young man 'had done a stint in reform school' (after the police had found him in possession of a knife).[34] Eleven of the twelve jurors are ready to convict. However, Juror #8 dissents from their view and this prompts his colleagues to call him an 'outlier'.[35] This critical response leaves Juror #8 undaunted. He advances arguments (eg, the person who inflicted the fatal wound must have been taller than the defendant) that lead the other jurors to rethink their position. However, Fish does not find in Juror #8's success evidence of a 'triumph of careful, reasoned argument … over premature judgment'.[36] Rather, it is a rhetorical triumph. This is because Rose 'takes care to put all the things the audience wants to hear - … be measured, be respectful of legal process – in Juror #8's mouth'.[37] Moreover, Rose describes Juror #8 as '"a man who sees all sides of every question and constantly seeks the truth"'.[38] These point lead Fish to conclude that *Twelve*

[27] *ibid*, 571, per Kennedy J.
[28] *ibid*, 572, per Kennedy J.
[29] *Obergefell v Hodges* 576 US (2015).
[30] Fish, n 1 above, 11.
[31] *ibid*, 35.
[32] *ibid*, 33.
[33] *ibid*.
[34] *ibid*.
[35] *ibid*.
[36] *ibid*, 34.
[37] *ibid*, 35.
[38] *ibid*, 33.

Angry Men is 'a liberal setup'.[39] For Rose presents it as 'a lesson in how to avoid being manipulated by surfaces, verbal and otherwise', while engaging in 'a tour de force of manipulation'.[40]

Fish finds in this example support for the conclusion that '[t]ruth independent of argument is not something we can have'.[41] This means that those who hope to stop argument in its tracks by fastening on 'the truth' are pursuing a chimera. On Fish's account, people who take this view assume that truth will emerge if 'you … institute a procedure' that excludes 'extraneous considerations' and wins universal respect.[42] The philosopher, Jürgen Habermas, provides Fish with an example of a thinker who takes this view. Habermas is a proponent of 'undistorted communication'.[43] Fish describes this as communication that excludes all motives save the cooperative search for truth. He adds that those who act on this motive seek to demonstrate mutual understanding by ascribing the same meaning to the same utterances. These points lead Fish to conclude that the goal of 'undistorted communication' is 'universal' (and, we might add, enduring) harmony.[44] On this view, Habermas holds out the hope of entry into the 'oasis' or 'safe space' that Fish believes to be unavailable to us. Fish responds to Habermas by arguing that it is impossible for us to 'occupy some independent, non-angled perspective – a contradiction in terms' – from which we can make uncontroversial judgments on how things stand in the world.[45] Consequently, we are not able to distinguish between 'good and bad arguments' – arguments that have the purpose of establishing a consensual understanding as against arguments that give us means of vanquishing our opponents.[46] This means that we must accept that we live (and 'always' will live) in the 'realm of instrumental purposes'.[47] On this view, 'interest' always saturates the fields we contemplate.[48] Fish argues that Habermas fails to grasp this because he assumes that all people can and should act in accordance with a philosophical ideal that requires them to transcend interest. However, 'saying that we are all philosophers' does not, according to Fish, 'make it so'.[49] Hence, he finds in Habermas's account of 'undistorted communication' an 'instance of the general failure of 'liberal rationalism'.[50]

By 'liberal rationalism', Fish means the view that we can stand 'above the partisan fray' by using what Thomas Kuhn has called 'a "neutral observation language"' to capture plain truth.[51] Fish sets against this view his own understanding of language and, more particularly, argument

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[39] *ibid*, 35.
[40] *ibid*.
[41] *ibid*, 32.
[42] *ibid*.
[43] *ibid*, 197 (where Fish discusses J. Habermas, *Legitimation Crisis* (Cambridge: Polity Press, 1988 [1973])).
[44] *ibid*, 198.
[45] *ibid*.
[46] *ibid*.
[47] *ibid*, 200.
[48] *ibid*.
[49] *ibid*.
[50] *ibid*, 201.
[51] *ibid*, 17, and S.E. Fish, *There's No Such Thing as Free Speech and it's a Good Thing, Too* (New York, NY: Oxford University Press, 1994) 137 (on seeking to stand 'above the partisan fray').

as 'action' that serves to advance an 'agenda' that is saturated in interest.[52] Aggression runs like a connecting thread through the examples he uses to illustrate the sort of action he has in mind. He says of the 'adversary system' of the common law that it creates a context in which 'verbal gladiators' do battle.[53] Moreover, he makes it clear that this and other such examples provide support for a more general point. There has, he declares, 'always been an intimate relationship between talking and warfare'.[54] He also identifies 'tension', 'self-assertion' and 'conflict' as 'characteristics of argument' and the human condition.[55] He adds that argument is a process that 'exasperation' always attends.[56] This is because 'the career of argument is always running ahead of the intentions and desires of those who engage in it' – with the result that it is a process we 'cannot manage'.[57] These claims are anything but surprising when we view them in the light of Fish's belief that argument is a response to the fact that 'nothing stays fixed; everything is ultimately up for grabs'.[58] This analysis presents a picture of people who struggle incessantly to establish, by means of argument, the basic terms of social life in contexts that are (and always will be) unstable.[59] Moreover, the instability with which they contend is due, in significant part, to argument.

Winning Arguments brings these aspects of Fish's thinking on argument into clear view. But, in many ways, the points he makes echo those in his earlier writings. In an essay entitled 'Force', he seeks to debunk the assumption (which he associates with liberalism) that law affords a shelter from the (agenda- and will-driven) storm of politics.[60] He uses H.L.A. Hart's distinction between the 'core' and the 'penumbra' of concepts (legal and non-legal) to illustrate the point that law is not the oasis or safe space that liberals take it to be. Hart famously argued that concepts have a core of certainty and an ineliminable penumbra of doubt.[61] On Hart's account, the core brings order and predictability to law's operations by establishing a determinate and impersonal source from which it issues.[62] By contrast, the penumbra leaves legal concepts with an 'open texture' that makes them conveniently malleable but, at the same time, a source of uncertainty and controversy on their proper extension.[63] Fish argues that the core of certainty to which Hart refers is not a property of language. Rather, it is a function of agreement in an interpretive community whose members invest the core with such significance as it possesses.[64] Here, Fish traverses ground over which Hart had already moved. This is apparent when Hart (drawing on Wittgenstein) observes that our ability to apply a particular

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[52] Fish, n 1 above, 138. See also 82 (on argument as an activity 'in the service' of an agenda).
[53] *ibid*, 132.
[54] *ibid*, 23.
[55] *ibid*, 117.
[56] *ibid*, 6.
[57] *ibid*, 7.
[58] *ibid*, 82.
[59] A 'conception of society in flux' reminiscent of American legal realism finds expression in Fish's exposition. See K.N. Llewellyn, 'Some Realism About Realism – Responding to Dean Pound' (1931) 44 *Harvard LR* 1222, 1236.
[60] Fish, n 7 above, ch 21.
[61] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2012, 3rd edn) 123.
[62] Fish, n 7 above, 505.
[63] Hart, n 61 above, 128
[64] Fish, n 7 above, 512.

term to a 'plain' case reflects a prior 'agreement in judgments' on its significance.[65] But while Hart deals with this point briskly, Fish uses it as the starting point for the pursuit of a familiar theme. For he describes the agreements to which Hart refers as contingent, rhetorical achievements. As such, they are vulnerable to the depredations of argument. Thus the core, like the penumbra, is a site of struggle (albeit a struggle that may stand, for lengthy periods of time, in a state of gravid arrest). This leads Fish to conclude that 'law is always and already indistinguishable from the forces it would oppose'.[66] He numbers among these forces particular agendas, convictions, programmes, and visions that people are ready to pursue 'aggressively' in the face of opposition from others.[67] Law emerges from this analysis (as it does from his account of the *Obergefell* and *Lawrence* decisions) as the site of political power struggles.[68]

In a later essay, 'The Law Wishes to Have a Formal Existence', Fish dwells on interpretation and argument as processes relevant to the operations of a legal system.[69] He tells us that law is supposed to be 'perdurable'.[70] With the aim of explaining what he means by 'perdurable', he draws on Hart's account of the way in which legal rules lay down an 'authoritative mark'.[71] According to Hart, all legal rules require an interpretive response (eg, do the facts in a dispute fall within or outside such-and-such a rule?).[72] However, Fish uses the phrase 'authoritative mark' to make a significantly different point.[73] He tells us that the purpose of such a mark is to bring the process of interpretation (the ascription of significance to an object under scrutiny) to an end. Fish describes those who take this view as formalists. For they assume that 'one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one … can ignore'.[74] To this Fish responds by declaring that 'anything, once a sufficiently elaborated argument is in place, can mean anything'.[75] However, he adds that, while law is not a 'strict' constraint (an authoritative mark in his sense), it is nonetheless 'constraining'.[76] By this he means that those who participate in law's operations cannot ignore it. However, they can seek to 'get around' it.[77] To this end, they must tell stories that derive their 'coherence' and 'plausibility' from legal sources.[78] By going about their business in this way, they have a realistic prospect of eliciting a positive response from the interpretive community to whom they address their words. In this way, law places constraints on people's

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[65] Hart, n 61 above, 126. See also 297 (note on 125), and L. Wittgenstein, *Philosophical Investigations* (Oxford: Basil Blackwell, G.E.M. Anscombe (trans), 1978 [1953]) 88 ([242]).
[66] Fish n 7 above, 520.
[67] *ibid*, 521,
[68] See M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley, CA: University of California Press, 1968) 53 (on 'power' as 'the probability that one actor within a social relationship will be in a position to carry out his [or her] own will despite resistance').
[69] Fish, n 51 above, ch 11.
[70] *ibid*, 143.
[71] *ibid*, 143. See also Hart, n 61 above, 95.
[72] *ibid*, 128-129.
[73] *ibid*, 126 and 128-129.
[74] Fish, n 51 above, 141.
[75] *ibid*, 148.
[76] *ibid*, 152.
[77] *ibid*.
[78] *ibid*, 151 and 169.

efforts to set aside 'the meanings embedded in [a] … text' in favour of those 'demanded by some angled, partisan object'.[79]

In light of these points (and those we considered earlier), the picture that emerges from *Winning Arguments* and Fish's other writings is complex. The self-applying 'authoritative mark' is a figment of the formalist imagination (at least as Fish describes it). Interpretation, argument, and the exercise of rhetorical power are inescapable. Consequently, law is a site of political struggle between people who seek to advance competing agendas. However, this struggle proceeds in an institutional context that is 'constraining'. But while this is the case, those who participate in such a struggle may nonetheless pose a threat to the framework within which it unfolds. This would be the case if they could 'get around' existing constraints in ways that made it possible to put in place a new set of foundations on which a new order could arise. These are points we can probe by reference to Carl Schmitt. But before doing so, we must examine Schmitt's thinking in some detail.

CARL SCHMITT ON LAW AND POLITICS

'Hostility to liberal legal thinking' is perhaps the most prominent feature of Schmitt's jurisprudential writings.[80] Signs of this hostility are apparent in an essay he produced while standing on the cusp of the decade (the 1920s) in which he would begin his rise to a position of jurisprudential prominence. In *Die Buribunken* (a 'historiographical essay'), he found in liberal legal contexts a misconceived 'striving for security'.[81] His aim in mounting this critique was to 'open[ ] … the present towards a contingent future'.[82] In the years that followed, Schmitt's anti-liberal ire intensified and found expression in an assault on the rule of law. He sought to demonstrate that efforts to meet the requirements of this ideal (by using publicly ascertainable norms to limit the state's powers and secure the interests of individuals) are futile. To this end, he embraced the idea of radical indeterminacy (absence of meaning) and applied it to legal language. On his account, radical indeterminacy was a pervasive problem in legal contexts. Consequently, legal norms were (even in the most avowedly liberal legal systems) empty vessels. This led him to mock liberal luminaries such as Montesquieu (who had identified judges as mouthpieces through which determinate bodies of law speak in clear terms to their addressees).[83] In response to Montesquieu's analysis (and others running on the same theme), Schmitt argued that law is 'situational'.[84] By 'situational', he meant a response to a particular set of circumstances that is not grounded on existing legal norms. This led him to conclude that those who resolve legal disputes (most obviously judges) exercise pure power.[85]

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[79] *ibid*, 142.
[80] W. Scheuerman, *Carl Schmitt: the End of Law* (Oxford: Rowman & Littlefield Publishers, 1999) 17.
[81] See R. Mehring, *Carl Schmitt: A Biography* (Cambridge: Polity Press, 2014) 83 (discussing C. Schmitt, 'Die Buribunken: Ein geschitsphilosophischer versuch' (1918) 4 *Summa* 89).
[82] *Ibid*.
[83] Scheuermann, n 80 above, 29.
[84] C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (London: University of Chicago Press, 2005, revised edn [1934]) 13.
[85] Scheuerman, n 80 above, 27.

Thus he gives us (at this still early point in his long career) an account of legal decision-making as 'perfect "wilfulness"' or, to use the term he favoured, 'decisionism'.[86]

Alongside, Schmitt's account of indeterminacy in the law, we should set two other features of his thinking that have relevance to Fish. The first is an understanding of politics that embraces a pessimistic political anthropology and a related commitment to what he called 'political theology'.[87] The second is an 'institutional turn' in his response to law's deficiencies that took place in the 1930s.[88] Just as Schmitt sought to undercut liberal assumptions concerning law's determinacy, he mounted an assault on a conception of politics to which liberals have long been committed. This conception identifies politics as a process of disinterested interest accommodation. Schmitt finds in this view of politics 'the undifferentiated optimism of a universal conception of man'.[89] His response to it is dismissive. For it fails to grasp that politics consists in a struggle between friends and enemies that, in its most intense forms, can turn into a life-and-death struggle.[90] Here, Schmitt stakes out a position that reflects a distinct political anthropology according to which politics always threatens to turn violent because humans are by nature 'bloodthirsty'.[91] This leads him to argue that an adequate understanding of politics 'cannot very well start with an anthropological optimism'.[92] By this he means that politics has to take account of the fact that people are not 'harmless' but, rather, 'dangerous'.[93] This is because they are 'stirred by their drives' (*e.g.*, fear, greediness, and jealousy) and have 'an irresistible inclination to slide from passion to evil'.[94] In order to counter these impulses, politics has to embrace not just the categories of friend and enemy but also those of good and evil.[95] This point explains Schmitt's mobilisation of the idea of 'political theology' (which places emphasis on the 'need [for] redemption').[96] He identifies political theology as resting (as its name suggests) on faith. Those who embrace any such faith assume it to be the pulsing centre of practical life and, in short order, identify themselves as good and their opponents as evil. Thus they are uncompromising (and none too reflective) in their pursuit of their aims. They take the view that they must fight for the 'truths' (dictates of faith) to which they cleave – even if this necessitates a potentially exterminatory clash with others.[97]

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[86] *Ibid*, 27.
[87] L. Vinx, 'Carl Schmitt', Stanford Encyclopaedia of Philosophy, https://plato.stanford.edu/entries/schmitt, Section 3 ('*The Concept of the Political* and the Critique of Liberalism') (last accessed 7 October 2018).
[88] M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt* (Abingdon: Routledge, 2013) 1.
[89] Schmitt, n 12 above, 65.
[90] *ibid*, 32-33.
[91] Scheuerman, n 80 above, 232.
[92] Schmitt, n 12 above, 64.
[93] *ibid*, 58.
[94] *ibid*, 59.
[95] H. Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction Between Political Theology and Political Philosophy* (Chicago, IL: University of Chicago Press, 1998) 16.
[96] Schmitt, n 12 above, 64. ('Political theology', as Schmitt elaborates this concept, has two dimensions, one systemic and one anthropological. The systemic dimension identifies the concepts that shape the secular state as exhibiting a structural identity with, and as deriving from, those in medieval theology. The second dimension focuses on humans as practical actors (and is, for this reason, highly relevant to the concerns of this essay). See M. Vatter, 'The Political Theology of Carl Schmitt' in J. Meierhenrich and O. Simonds (eds), *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2016) ch 8.)
[97] Schmitt, n 12 above, 67-68 (on, *inter alia*, Oliver Cromwell's hostility towards 'papist' Spain).

In the 1930s, Schmitt continued to describe politics as a struggle between friends and foes. However, he moved away from 'decisionism' as he had elaborated it in the 1920s and made an institutional turn in the direction of what he called 'concrete-order thinking'.[98] In *On the Three Types of Juristic Thought*, he identified law as a source of meaningful constraints where judges and others understand it as expressing the concerns of a group whose common life they share.[99] More particularly, he identified a shared cognitive background as shaping the thinking of those who make up such groups.[100] Against such a background, it becomes possible to grasp the uses to which law (and other artefacts) can be put. Notoriously, Schmitt's 'institutional turn', along with his understanding of politics, gave him a basis on which to lend enthusiastic support to the Nazi movement.[101] Unlike, Schmitt, Fish is not in the business of staking out a programmatic position. However, there are aspects of Schmitt's thinking that yield a basis on which to draw out some of the practical implications of what Fish has to say in *Winning Arguments* and elsewhere.

FISH AND SCHMITT: POINTS OF INTERSECTION

The most obvious point of intersection between Fish's writings on law and those of Schmitt is commitment to the view that language is not a strong constraint on the exercise of judicial discretion. In Schmitt's early work this view finds expression in his relentless pursuit of the theme that the problem of indeterminacy afflicts legal language. We can read Fish as endorsing this view when he declares that 'anything, once a sufficiently elaborated argument is in place, can mean anything'.[102] On this view, law does not provide us with determinate norms that repel 'partisan' interpretations. However, in Fish's writings on interpretation, the emphasis is not on words themselves. Rather, it is on the interpretive communities whose members ascribe significance to them. These groups are, on Fish's analysis, the source of meaning. This means that words become placeholders for 'concerns' their members have in common (and that reflect not definitional uniformity but what Wittgenstein called 'agreement … in judgments').[103] For so long as such a group responds to these concerns in broadly similar ways, the meaning of a word (while open to a range of interpretations) is stable. When the view of the group shifts in a new direction, a change in what the philosopher John Searle calls 'collective intentionality' takes place.[104] The members of the group now share the intention of sustaining a new understanding (and the institutional landscape or social reality that it holds in place). On this view 'a word is the skin of a living thought' – with the source of life being intersubjective (consensus in an interpretive community).[105] This is a view that bears some similarities to the position Schmitt staked out when he made his 'institutional turn' in the 1930s. For he argued

[98] Croce and Salvatore, n 88 above, ch 3.
[99] C. Schmitt, *On the Three Types of Juristic Thought* (Westport, CT: Praeger, 2004 [1934]) 47-57. See also W. Scheuerman, n 80 above, 123.
[100] Schmitt, n 99 above, 56.
[101] Croce and Salvatore, n 88 above, 31.
[102] See n 75 above (and associated text).
[103] S.E. Fish, *Think Again: Contrarian Reflections on Life, Culture, Politics, Religion, Law, and Education* (Princeton, NJ: Princeton University Press, 2015) 181, and L. Wittgenstein, n 65 above, [242]. PAGE
[104] J. Searle, *Making the Social World: The Structure of Human Civilization* (Oxford: Oxford University Press, 2010) chs 1, 2, and 5.
[105] On words as 'the skin of a living thought', see *Towne v Eisner*, 245 U.S. 418, 425 (1918) per Holmes J.

that law will be effective in circumstances where it reflects the views of those who see it as capturing their (intersubjective) understanding of what normality consists in.[106]

Alongside the broadly similar view that Fish and Schmitt take on language, we must set accounts of humankind that have much in common. Both 'will' and 'aggression' bulk large in Schmitt's writings on this topic. Schmitt makes it clear in his early work that will fills the void left by indeterminate legal language. When he later places emphasis on the group as a steadying influence on the operations of the law, will (now in a collective form) continues to occupy a prominent place in his thinking.[107] Moreover, this will is implacable. In the face of resistance, it will respond with a vigour that tends in the direction of aggression. Here, Schmitt's thinking reflects the influence of thinkers (eg, Thomas Hobbes and Niccolò Machiavelli) who assume people to be aggressive.[108] A broadly similar picture emerges when we consider Fish's reflections on what he calls 'the human condition'.[109] On his account, people are assertive and restless in their efforts to advance their respective agendas. On the topic of assertiveness, *Winning Arguments* provides support for a theme that Fish has developed in his earlier writings. This is that, in practical spheres like law, 'there is no final word'.[110] Rather, there are 'only the words provoked by those intended as final'.[111] Fish presses this point further in *Winning Arguments* when he describes argument as 'always running ahead of the intentions and desires of those who engage in it'. Here, he presents us not merely with an account of argument as a practice that has no obvious stopping point but of those who engage in it as restless.

Fish's account of 'the human condition' puts wind in the sails of Schmitt's critique of the 'anthropological optimism' he finds in liberal political philosophy. Thus it becomes possible to argue that Fish, like Schmitt, stakes out a position in the field of political anthropology.[112] To enter this field is to traverse tricky, contested territory (where the likelihood of making truth-claims that will win broad support is low). While this is the case, we ignore political anthropology at our peril. Thinkers who have the status of major reference points in contemporary jurisprudence have made contributions that are, at least, relevant to (if not consciously on) this topic. This point applies, for example, to Herbert Hart's account of 'the minimum content of natural law'. Here, Hart (drawing on Thomas Hobbes and David Hume) presents us with a list of considerations to which groups of people must be attentive if they seek to endure.[113] Ronald Dworkin moves onto the terrain of political anthropology when he

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[106] Schmitt, n 99 above, 56.
[107] Croce and Salvatore, n 88 above, 52 (on Schmitt's 'institutionalist decisionism').
[108] Schmitt, n 12 above, 65.
[109] On this point of intersection, see R. Mullender, Book Review: *The Trouble with Principle* (2001) 28 *Journal of Law & Society* 621, and Robertson, n 14 above, 173-176.
[110] Fish. n 7 above, 286.
[111] *ibid*.
[112] This label seems apt in light of Schmitt's critique of liberalism's 'anthropological optimism' and Fish's 'human condition'-related variation on the same theme.
[113] Hart, n 61 above, 193-200 (where Hart focuses on, *inter alia*, the 'limited altruism' of human beings and the challenge this poses for those who have 'the modest aim of survival'). Hart deflects attention from the anthropological significance of the 'the minimum content to natural law'. This is due to his decision to apply the uncharacteristically clumsy label 'descriptive sociology' to his account of the circumstances in which the need for law gains practical urgency.

dwells on the human capacity to foster communities in which people bestow equal concern and respect on one another.[114] Moreover, he presents us with an optimistic political anthropology that contrasts with Hart's more pessimistic (because Hobbes- and Hume-inflected) contribution.

The fact that we find Hart and Dworkin (along with Fish and Schmitt) staking out distinct (and inevitably controversial) positions in this territory merits emphasis. Their presence in this context points up the breadth of their respective contributions to jurisprudence. These contributions are, to be sure, very much concerned with the delivery of insights that are analytic in orientation. Thus we find Hart focusing on the prominent role played by rules in a legal system and Dworkin dwelling on principles and the light they throw on the character of such a system's normativity.[115] However, each of these contributions contains a more speculative component (of which analytic philosophy is chary) that falls within the field of political anthropology.[116] In each case, this component has relevance to the liberal political philosophy at which Fish and Schmitt direct critical fire. This is a point we will examine in detail in this essay's penultimate section (where our focus will be on some of the large ambitions at work in the liberal tradition). We will consider (in the light of the anthropological positions that Fish and Schmitt stake out) the extent to which it might be possible to realise these ambitions. However, before we turn to this topic, we will look more closely at Fish and Schmitt and set their respective contributions in the context of those offered by Hart and Dworkin. By doing this, we will be able to pin down some important differences between Fish and Schmitt. These differences have, as we will see, relevance to their respective responses to liberal political philosophy.

HART, DWORKIN, AND SOME DIFFERENCES BETWEEN FISH AND SCHMITT

As we noted in the last section, Fish and Schmitt share the assumption that people are prone to fall into conflict. While this is the case, we should note a related point of divergence between them. Schmitt relishes conflict. On his account, conflict (in the form of friend-versus-foe politics) makes it possible for groups to vanquish their enemies in battles that see them driven permanently from the field. Fish sounds a similar note when he talks of a 'final conflict' in which one agenda supplants another.[117] Such struggles arise when the proponents of 'fundamentally incompatible visions' come into collision and there is no effective constraint (procedural or systemic) on what Fish has called 'the freedom to win'.[118] In such circumstances, those who lose suffer a 'hard-edged exclusion'.[119] Moreover, Fish has argued

[114] R. Dworkin, *Law's Empire* (London: Fontana Press, 1986) 195-215.
[115] Hart, n 61 above, ch 5, and R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), chs 2-4.
[116] Analytic philosophy's chariness on speculative topics is due to its 'minimalism'. It is a 'clarificatory enterprise' that has to do with the analysis of, *inter alia*, concepts, practices, and institutions in ways that make assumptions that are 'as weak … as possible'. Its practitioners eschew 'maximalism' (an approach to philosophy that finds expression in 'richer' analyses that defend 'deeply controversial' positions in fields that may lack a clear 'central element'). See N.E. Simmonds, 'Bringing the Outside In' (1993) 13 *Oxford Journal of Legal Studies* 147, 149, 153-155, and 157.
[117] Fish, n 51 above, 297, and Robertson, n 14 above, 82.
[118] Fish, n 13 above, 208 and 254.
[119] Robertson, n 14 above, 107. (For a vivid, if rather sweeping, account of a hard-edged exclusion, see J. Black, *English Nationalism: a Short History* (London: Hurst & Company, 2018) 27 (on Sir Henry Chauncy's account

that such exclusions take place in the context of 'large P politics' where 'routing the enemy' is the aim of those in dispute.[120] But while Fish contemplates 'change' in this cataclysmic form, he also talks of 'reversal'. The relationship between these two processes merits close attention. 'Change' may have to do with struggles in which one side prevails at the expense of another. But 'reversal' indicates that those who have suffered defeat (in such a struggle) may (at least on some occasions) return successfully to the fray. Thus while Schmitt places emphasis on obliterating defeat, Fish entertains the possibility that an agenda may go into abeyance (and await the efforts of advocates who will breathe life back into it). Here, we find at work in Fish's thinking the assumption that it may be possible to undo the effects of argument by argumentative means. More particularly, the idea of 'reversal' brings Fish close to a procedural commitment that, on his account, features prominently in liberal political philosophy. This is the idea that 'each party will get its turn at bat'.[121]

To the extent that this is the case, Fish's thinking bears some similarities to that of Ronald Dworkin, a liberal upon whom he has heaped criticism.[122] Dworkin identifies a commitment to argument on a 'fraternal' model as a feature of liberalism.[123] Argument on this model establishes a space for disagreement within which all participants recognise one another as having an enduring entitlement to take up a place. However, the disagreements that unfold in this space can be fraught. Dworkin makes this plain when he describes legal disputes in this context as 'wars'.[124] The 'wars' he has in mind are concerned with concepts (eg, 'justice', 'liberty', 'equality', and 'democracy') that are legally (and politically) significant.[125] Dworkin says of these and other such concepts that they establish 'abstract plateaus of agreement'.[126] By this he means that they are underdeteminate. They bear meaning but are open to a range of interpretations, each of which presents us with a distinct 'conception' of the relevant concept.[127] Dworkin also describes those who ascribe meaning to these concepts as doing so on an 'engaged' basis.[128] By this he means that they are participants in a 'discourse' or 'practice' towards which they adopt a critical, reflective attitude (with the aim of making it 'the best it can be').[129] He adds that such a practice has a 'first-order' character (since understandings as to what might make it the best it can be arise within it and acquire the status of authoritative criteria).[130] Dworkin contrasts discourse on this 'engaged' model with an approach to which

(written in 1700) of the way in which 'the Saxons … subdued the Britons' and 'endeavoured to extinguish' their laws, language and religion.)

[120] Fish, n 13 above, 208 and 289. See also Meier, n 95 above, 57-59 (on Schmitt's account of the world of 'great politics' where friends and foes clash).

[121] Fish, n 51 above, 16.

[122] See, for example, S.E. Fish, 'Still Wrong After All These Years' (1987) 6 *Law & Philosophy* 401, and S.E. Fish, 'Dennis Martinez and the Uses of Theory' 96 *Yale LJ* 1773 (1987).

[123] Dworkin, n 114 above, 413.

[124] R. Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1, 2.

[125] *ibid*, 5.

[126] *ibid*, 7.

[127] *ibid*, 2. See also Kutz, n 5 above, 1001-1002 (on underdeterminacy), and Dworkin, n 114, 70-72 (on concepts and 'conceptions').

[128] Dworkin, n 124 above, 2**.**

[129] *ibid*, 2-3, and Dworkin, n 114 above, vii, 52, and 229.

[130] Dworkin, n 124 above, 2.

he applies the label 'Archimedeanism'. By Archimedeanism he means a 'second-order' or 'meta'-discourse that stands outside of context and affords (according to its proponents) a 'platform' from which it is possible to apprehend universal truth.[131]

Dworkin rejects Archimedeanism and nails his colours to the mast of engaged discourse.[132] By doing this, he embraces the idea that argument is (to take a phrase from Fish) 'all we have'.[133] Dworkin's decision to adopt this position also makes it possible for us to classify him as a proponent of the theory-ladenness of fact. A prominent assumption at work in the politico-legal context he describes supports this view. This is the assumption that all those who participate in the argumentative 'wars' he describes must do so in ways that conform with the principle that all members of society merit equal concern and respect.[134] Here we find an argumentative resource that promises (from the relevant first-order standpoint) to make the context in which it has force the best it can be. Moreover, this is a feature of Dworkin's approach to argument that throws light on his understanding of the relationship between law and politics. Law places constraints on the range of ways in which the argumentative 'wars' that feature in his analysis can unfold. The principle that all members of society merit equal concern and respect is one such constraint (or limitation on the freedom to win). To the extent that Fish suggests something similar when he talks not just of 'change' but of 'reversal', his thinking diverges significantly from that of Schmitt.

We can explore the understanding of the relationship between law and politics that finds clear expression in Dworkin and that seems to inform Fish's thinking by drawing on Hart's account of law as a system. Hart's exposition affords a basis on which to draw a sharp distinction between Fish and Dworkin. Moreover, this contrast makes it possible to highlight ways in which Fish's thinking diverges significantly from that of Schmitt. But before we turn to these matters, we must examine what Hart has to say on law as a system. His focus is on 'mature' municipal legal systems (and his aim in analysing them is to contribute to general jurisprudence by making universal truth-claims).[135] The analysis he offers is spare. He presents us with a hierarchy of norms. In combination, these norms constitute a distinct (systemic) normative space. This space radiates down and out from a highest-order norm, the rule of recognition (which provides the ultimate test of legal validity within any such system). Within spaces of this sort we find, 'primary' rules that place people under obligations. We also find 'secondary' rules that make it possible to change existing law and to resolve legal disputes.[136] If such a

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[131] *ibid*, 2-3.

[132] A. Ripstein, 'Introduction: Anti-Archimedeanism' in A. Ripstein (ed), *Ronald Dworkin* (New York, NY: Cambridge University Press, 2007) 5-6.

[133] See n 2 above and associated text.

[134] Dworkin, n 114 above, 222.

[135] Hart, n 61, above, 110. (Hart's commitment to the pursuit of universal truth makes him a proponent of 'good' (aperspectival) argument on the model Fish identifies as a non-starter. See n 46, above, and associated text. Dworkin classifies Hart's approach as Archimedean. See Dworkin, n 124 above, 3-5.)

[136] Hart also identifies the rule of recognition as having a 'secondary' character. However, any such norm has (as we have noted) a highest-order status in the system of which it is a part. Hart's picture of a legal system thus bears obvious similarities to the *Stufenbau* (norm-tree) in H. Kelsen, *General Theory of Law and State* (London: Transaction Publishers, 2006) xxvii. For further discussion of these similarities, see R. Mullender, '*Politeia's* Place in Our Practical Life: Pierre Bourdieu on the Modern State' (2018) 68 *University of Toronto Law Journal* 694, 695 and 702-703.

system is to endure, a sufficient number of those who participate in its operations (be they legal officials or others) must accept the rule of recognition's highest-order status. In this context, acceptance involves a readiness on the part of the law's addressees to treat it as the ultimate source of authoritative reasons for action. Those who make such a response adopt what Hart calls law's 'internal point of view' (and take a not merely accepting but 'critical' and 'reflective' attitude towards it).[137] As well as presenting us with this picture of a legal system, Hart also recognises that the positions lawmakers stake out within it are politically significant. They may, for example, seek to accommodate goods that compete with one another (such as freedom of action and security) in particular ways.[138] To these features of Hart's account of law as a system, we should add one more. He recognises that the beginnings of any such system have a raw political character. These beginnings take the form of a claim to authority that elicits a positive response from enough people to establish a rule of recognition. Here, Hart uses a phrase that would not look out of place in Schmitt's writings. For he declares that 'all that succeeds is success'.[139]

Hart's analysis prompts very different responses from Fish and Dworkin. Fish focuses on Hart's account of the core of certainty that legal rules exhibit. He tells us that the core (as Hart describes it) establishes a 'barrier' or 'gate' that places limits on the exercise of discretion.[140] Fish is dismissive of the idea that rules work in this way and finds in Hart's determination to 'cling to the core' a 'strategy of desperation'.[141] He takes this view because the core (as we noted earlier) is the product of prior interpretive activity that has won assent in a particular interpretive community (thus establishing agreement in judgments). As such it is a contingent feature of the legal scene that may be swept aside by later interpretive activity (on the part of those who seize 'the opportunities afforded by power and occasion').[142] Here, Fish concludes that the point Hart makes on the rule of recognition's origins ('all that succeeds is success') has general application to legal rules and other norms.[143] As we noted earlier, the phrase 'all that succeeds is success' sounds a Schmittian note. This is because the successes that Hart and Fish contemplate are, in fact, about more than success (a bare outcome). They have to do with 'complex' social facts that encompass will (on which Schmitt places emphasis) and the change it brings about by rhetorical means (to which Fish gives pride of place).[144]

While Fish's response to Hart concerns language and its limitations as a constraint on will (and rhetoric), Dworkin takes a quite different tack. He focuses on the nature of the claims to authority and the felt sense of obligation that arise in legal systems of the sort Hart describes. According to Hart, claims to authority in these systems could be purely legal. He took this

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[137] Hart, n 61 above, 57
[138] *ibid*, 133.
[139] *ibid*, 153. See also C. Schmitt, *Dictatorship: From the Origins of the Modern Concept of Sovereignty to Proletarian Class Struggle* (Cambridge: Polity, 2014, 3rd edn [1921]) 118 (on 'sheer power') and 127 (on sovereign power that only exists in relation to what it does (*quoad exercitium*)).
[140] Fish, n 7 above, 519.
[141] *ibid*, 509.
[142] *ibid*, 512
[143] *ibid*, 516.
[144] N. Lacey, 'The Path Not Taken: H.L.A. Hart's Harvard Essay on Discretion' (2013) 127 *Harvard LR* 636, 639 (on Hart's rule of recognition as 'a complex social fact').

view because he was a proponent of the legal positivist separability thesis, according to which there is no necessary connection between law and morality.[145] Dworkin rejects this thesis and seeks to demonstrate that law's claims to authority and the sense of obligation it fosters are moral.[146] As well as making this response to Hart, Dworkin also argues that the morality at work in modern municipal legal systems (such as that of the USA) is a driver of egalitarian reform. More particularly, he argues that it requires lawmakers to fashion norms, and establish institutions and practices, that all those affected by the law's operations have reason to endorse.[147] Here, Dworkin takes his cues on morality from the moral and political philosopher Immanuel Kant.[148] For Kant argued that morality places us under a duty to meet the requirements of a categorical imperative (by acting only on principles of action to which all people could rationally assent).[149] As well as staking out a position on law's normativity that calls Kant to mind, Dworkin forges a link between it and Hart's account of law as a system. He accepts that legal systems place institutional constraints on the range of ways in which lawmakers can use the power at their disposal to advance the cause of morality.[150] However, he contemplates the possibility of moral progress in the direction of a 'purer form of law within and beyond the law we have'.[151] On this view, lawmakers may be able to stake out a wide range of morally defensible positions within an existing legal system. But if the system limits their capacity to work along these lines, then the attractions of 'law beyond the law' (a more adequate systemic space) will become apparent to them.[152] Moreover, if they were to establish such a space, it would, on Dworkin's analysis, count as a clear instance of moral progress (since it would be a step in the direction of 'pure' law).[153]

Dworkin devotes closer attention than Fish to institutional constraints in legal systems of the sort that feature in Hart's analysis. However, Fish's reflections on processes of 'transformation' (in the law and elsewhere) intersect with Dworkin's concerns. For example, in an essay called 'Transmuting the Lump', he argues that a succession of incremental changes can bring about a fundamental alteration in the way we understand a normative space. Where this happens a new 'stabilising …centre' '*speaks* [the] landscape and declares the shape of everything in it'.[154] These points lead Fish to conclude that 'human beings are able to construct the roadway on which they are travelling' and that it may carry them in new directions.[155] He adds that those who move along such a 'roadway' may regard their previous commitments as nothing more than a 'way station'.[156] However, he does not, when contemplating such developments, talk in terms of progress (other than in the sense of movement). Rather, he

[145] Hart, n 61 above, 322 (notes to 185-186).
[146] Dworkin, n 114, above, 96-98, and Dworkin, n 124 above 4 (describing legal argument as 'characteristically and pervasively moral argument').
[147] R. Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) 205.
[148] S. Guest *Ronald Dworkin* (Stanford, CA: Stanford University Press, 2013) 23-24.
[149] P. Guyer, *Kant on Freedom, Law, and Happiness* (Cambridge: Cambridge University Press, 2000) ch 5.
[150] Dworkin, n 114 above, 139.
[151] *ibid*, 407.
[152] *ibid*.
[153] *ibid*, ch 11 and 407.
[154] Fish, n 7 above, 249 and 284.
[155] Fish n 51 above, 156.
[156] Fish, n 7 above, 402.

presents a picture of people who struggle perpetually to advance the agendas they favour in bounded argument spaces whose contours they may reshape through the successful exertion of rhetorical power.

As an account not merely of argument but also of 'the human condition', this is bleak. Those with power (here in a rhetorical form) prevail. Moreover, they do so by seizing the 'opportunities afforded by … occasion'.[157] In these ways, they determine the direction of practical life –and the upshot of their efforts is 'episodic' rather than 'teleological'.[158] These points make it possible to bring into focus another difference between Fish and Schmitt. While Fish fastens his attention on 'context-specific' argument and its effects, his analysis has the appearance of an exercise in what we might call anthropological Archimedeanism. This is because it appears to proceed from a platform that stands outside of context and that makes it possible to see argument for what it is: a power struggle that we can expect to unfold endlessly and in ways that do not hold out the promise of progress. Schmitt's account of friend-versus-foe politics carries us over much the same terrain. But unlike Fish, he (as we noted earlier) relishes the conflict he contemplates. Moreover, during the period in which he gave his support to the Nazis, he seems to have found a teleology of 'progress' (on a racial supremacist and Social Darwinist model) at work within friend-versus-foe politics.[159] In Fish, by contrast, we find no hint of teleology. His aim is simply to present an accurate account of how things stand among those who engage in and live with argument's 'episodic' effects.

Fish goes about his business in this way with great discipline. As an anthropological Archimedean, his concern is with 'non-local truth' (as it manifests itself in context-specific ways).[160] Discipline is also plain to see in his determination not to pursue an agenda, programme, or goal (eg, a model of human association) of the sort we have associated with politics.[161] These features of *Winning Arguments* and his other works lend them a politically inert appearance. However, there is a tendency towards equivocation in his writings that suggests that a distinct politics may be at work within them. This tendency towards equivocation becomes apparent when we juxtapose his account of a 'final conflict' with what he has to say on 'reversal' (following 'change'). 'Reversal' (for the reasons we explored earlier) sounds an inclusionary, egalitarian note, while talk of a 'final conflict' has a Schmittian ring. There is certainly a tension between the idea of a 'reversal' and that of a 'final conflict'. We might seek to mute this tension. To this end, we could argue that 'reversal' relates to 'change' within a space whose contours remain stable (eg, the US Supreme Court's decision in *Obergefell*). By contrast, we could say of a 'final conflict' that sees the defenders of the status quo go down to obliterating defeat against their opponents, that it results in (systemic)

[157] See n 142 above (and associated text).
[158] Fish, n 1 above, 89.
[159] R. Cecil, *The Myth of the Master Race: Alfred Rosenberg and Nazi Ideology* (London: HarperCollins, 1972), and R.J. Evans, *The Third Reich in Power, 1933-1939* (London: Allen Lane, 2005) 708.
[160] T. Nagel, *The View From Nowhere* (Oxford: Oxford University Press, 1986), 10.
[161] Fish argues that academics should 'academicize' (which, on his account, involves them in making accurate claims about the objects (eg, a field and/or the objects within it) to which they devote attention). He also argues that they should (in the course of their work) resist the urge to pursue socially significant programmatic ends. See S. Fish, *Save the World on Your Own Time* (Oxford: Oxford University Press, 2008) 27-30.

'transformation'.[162] But to make these points, is to draw a sharp distinction that Fish's emphasis on the malleability of 'argument spaces' does not encourage. In light of these points, it seems warranted to talk of a tendency towards equivocation. For the source of tension on which we have focused leaves us wondering if the 'conflict' to which Fish refers really would be 'final'. Likewise, it prompts the thought that he may be more of a liberal than he recognises. To find that liberalism has perhaps exerted influence on one who has spent decades in the academy would be far from surprising. Moreover, if liberalism does tinge his thinking, it is important not to make too much of this point. It may simply reflect the fact that 'we knowers are', on occasion, 'unknown to ourselves'.[163] Matters are, certainly, very different when we turn to Schmitt. While he had extensive exposure to liberal academe, its decencies and decorums did not foster anything resembling an inclusionary, egalitarian sensibility in him. In his writings, there is no equivocation on the point that, when friends and foes come into conflict, the outcome (for those on the losing side) could be fatal.[164]

Fish certainly has no enthusiasm for this ghastly prospect. But, as we have noted, he sets his face against progress on the model we found earlier in Dworkin. Consequently, he adopts a position quite unlike those contributions to the liberal tradition that seek to point the way towards an end-state in which people secure their interests on an enduring basis. Dworkin presents us with the outlines of such an end-state when he proposes ways in which to bring 'justice', 'equality', 'liberty', and 'democracy' into a harmonious and lasting relationship. On his account, this will involve (among other things) establishing conditions that make 'majority rule' 'fair'.[165] These conditions include a constitutional system of individual rights against the majority that judges uphold by means of judicial review.[166] Here, we find Dworkin contemplating a politico-legal oasis or safe space in which politicians, lawyers, and 'ordinary people' argue about the significance of the values and ideals they share while remaining free from threats to their security.[167] Thus they conduct politico-legal 'wars'. But, happily, these are wars in which there are no enemies of the sort who might descend to 'large P politics'.[168] As we have noted, Fish takes the view that we cannot hope to establish and maintain a framework of the sort Dworkin contemplates (due to the limitations of legal language and the aggressive propensities of people). However, it may be possible to establish a normatively appealing, highly resilient, but not entirely safe space. Such a context may also throw light on a form of liberalism more modest than that on offer in Dworkin's works and those of other liberals with equally large ambitions (eg, Habermas). This chastened form of liberalism may also be able to withstand at least some of the criticisms that Fish levels at more ambitious

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[162] See n 25 above and associated text.

[163] F. Nietzsche, *The Birth of Tragedy and The Genealogy of Morals* (New York, NY: Doubleday, 1956 [1872 and 1887]) 149.

[164] Even in old age, Schmitt took the view that '"the new human being" of secularised modern times will … develop new forms of enmity' that find expression in friend-versus-foe politics. See Mehring, n 81 above, 513.

[165] Dworkin, n 124 above, 7.

[166] *ibid*, 6.

[167] *ibid*, 2-3 and 6-7. See also R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press, 2011) 1 and 4 (arguing for 'the unity of value', which will make it possible to bring all sources of value (eg, justice, liberty, equality, and democracy) into a 'thoroughly integrated' relationship).

[168] Dworkin, n 114 above, 413 (on the law's addressees as 'united in community, though divided in project, interest, and conviction').

contributions to the liberal tradition. Moreover, there are reasons for thinking that liberalism in this modest form may be able to draw strength from Fish's account of interpretive communities. In the section below, we will explore these possibilities by reference to British law.[169]

A CHASTENED LIBERALISM IN A NOT ENTIRELY SAFE SPACE

Britain's constitutional order presents us with a context to which Hart's account of modern municipal legal systems has ready applicability. This is because we find a normative space that radiates out and down from its highest-order norm, the rule of recognition (Parliamentary sovereignty). Within this space, lawmakers have been able to stake out a wide variety of political positions that have attracted the labels 'liberal', 'conservative', and 'socialist'.[170] Likewise, judges have fashioned norms at common law that accommodate politically significant values that stand in tension-filled relations with one another (eg, security and freedom of action).[171] Insofar as positions such as these sit within this space, we can describe it as 'politico-legal' rather than simply 'legal'. This description seems apt when we consider the conflictual character of the political process that often unfolds in this context. It is a context in which a Conservative politician may find intimations of 'Gestapo'-like authoritarianism in socialism and in which his socialist opponent may describe Conservatives as 'lower than vermin'.[172] Here we find politics on a model that can, and on occasion does, tend in a Schmittian direction. But at the same time, it is a context in which commitment to an egalitarian philosophy of government has found increasingly strong expression. It is apparent in extensions in the franchise (from 1832) that issued (in the twentieth century) in universal suffrage and in a body of anti-discrimination and human rights law that has grown apace in the last half-century.

When we view this context from the standpoint of liberal political philosophy (on the ambitious model exemplified by Dworkin) it is less than ideal. This is because the sovereign legislature could sweep away the egalitarian commitments that have been accumulating in it along a lengthy timeline. More fundamentally from a systemic standpoint, a sustained argumentative assault on the rule of recognition could undercut its highest-order status. The culmination of such an assault might be a 'final conflict' in which this system passes out of existence. Such a development could carry those who live with its effects in a range of directions. Some of these directions may be progressive (eg, an intensification of existing egalitarian commitments), while others may be retrograde (eg, practical arrangements that entrench social disadvantage). For this reason, those who live within this framework are not entirely safe from the successful

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[169] While we will focus on law in Britain, the same sort of analysis has application to other mature municipal systems (eg, that of the USA) and to the end-state Dworkin imagines. See also C. Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004) 4 (on 'security' as the 'most important' 'common benefit' in such contexts (real and imagined)).

[170] W.H. Greenleaf, *The British Political Tradition, Volume Two, The Ideological Heritage* (London: Methuen & Co, 1983), and A.V. Dicey, *Lectures on the Relation Between Law & Public Opinion in England During the Nineteenth Century* (Liberty Fund, IN, 2nd edn , 2008 [1917]) Lecture IV.

[171] Hart, n 61 above, 132-133.

[172] D. Kynaston, *Austerity Britain, 1945-51: Tales of a New Jerusalem*, (London: Bloomsbury, 2007) 64-65 ('Gestapo' (Winston Churchill)) and 284 ('vermin' (Aneurin Bevan)).

advance of retrograde politics. But this, on Fish's analysis, is an inescapable state of affairs. For human beings, as we noted earlier, have it in their power 'to construct the roadway on which they are travelling' – and, in this way, 'open[ ] the present towards a contingent future'.[173]

While it is clearly possible to construct a roadway out of the system we are considering, this has not happened.[174] This may reflect the fact that it has operated in ways that have, along a lengthy timeline, elicited consistently (if not invariably) positive responses from those who live within it. This is a point to which political anthropology on the less optimistic model we considered earlier lends some support. Consider Hobbes (whose thinking, as we have noted, has affinities with that of Fish and Schmitt). He pursues the theme that people have reason to co-operate with sovereign power for as long as it secures their interest in the fundamental good of peace.[175] However, he also sees in humankind a standing threat to politico-legal institutions. For people have at work within them impulses that make them assertive and disputations. This means that they may be ready to unpick the practical arrangements that go some way towards securing their interests. This feature of their make-up led Hobbes to stake out a position on language (in the law and more generally) that amounts to an exercise in 'verbal engineering'.[176] Moreover, it is a position that brings him (for reasons we will explore below) into conflict with Fish. Hobbes argues that those who cooperate with the sovereign should accept that it has the power to stipulate the meaning of all words in the public language.[177] A sovereign who pins meaning down in this way would, according to Hobbes, forestall the danger that arises when people become 'entangled in words' as a result of arguing over the meanings they should bear.[178] This is the danger that such entanglement will excite the assertive, disputatious impulses that sovereign power exists to quell.

While Hobbes urges us to avoid 'entanglement in words' (by giving the sovereign the power to stipulate meanings), we can extract from Fish (who labels him an 'arch formalist') support for a contrary conclusion.[179] Moreover, it is a conclusion that may throw light on the powers of endurance exhibited by the legal system we are considering. In order to explain why this is the case, we must return to Fish's account of interpretive communities. As we noted earlier, he identifies these communities as the source of the meaning that finds expression in the language their members use. He also recognises that this language, while being a common 'point of reference', is open to a range plausible interpretations.[180] While he does not use the term, he thus provides support for the conclusion that the language that features in the communities he describes is underdeterminate. When people explore the range of ways in

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[173] Fish n 51 above, 156, and Mehring, n 81 above, 83.
[174] The United Kingdom's accession to the European Economic Community in 1973 did not constitute such a change since it retained what Viscount Kilmuir LC described (in the 1960s) as a 'liberty to repeal'. See N. Duxbury, *Viscount Kilmuir: A Vignette* (Oxford: Hart Publishing, 2015) 113.
[175] T. Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1991 [1651]) chs 13-18.
[176] V. Silver, 'The Fiction of Self-Evidence in Hobbes's Leviathan' (1988) 55 *ELH, A Journal of English Literary History* 360, 371.
[177] Hobbes, n 175 above, xvii.
[178] *ibid*, 28.
[179] S.E. Fish, *Versions of Antihumanism: Milton and Others* (Cambridge: Cambridge University Press, 2012) 260.
[180] Fish, n 7 above, 508.

which it is possible to use such language, they become entangled in words. Just such entanglement is a feature of politico-legal life in the normative space we are considering. Terms like 'natural justice' in public law and 'consideration' in private law bear readily intelligible meaning and, at the same time, invite exploration. So too do 'equality', liberty', 'justice', and 'democracy' (within legal and political institutions and more generally). As the process of exploration unfolds, the terms under scrutiny become sites of conflict (as members of particular interpretive communities vie with one another to pin down meaning in plausible ways). But at the same time, these and other such terms become placeholders for a limited, but revisable, range of concerns that tell a story of community-wide consensus. Consider 'natural justice'. It prompts those who reflect on it to consider the requirements of procedural justice and the social effects (positive and negative) of adhering to this ideal.[181]

There are reasons for thinking that Fish underestimates the significance of language that works in this way. This is a point we can bring into sharp focus by thinking of such language as a form of social capital. 'Social capital' encompasses all those practical attitudes, dispositions, practices, and institutions that foster and sustain co-operation between people.[182] Terms such as 'natural justice' have a distinct (if malleable) shape that is a function of cooperation (collective intentionality) in the interpretive community whose members use them. Hart lends support to this point when he describes language as having a meaning-bearing 'core'. However, he makes only a glancing reference to the social capital that core meanings embody and that grows up around them (in, for example, institutional form). He does this when he forges a link between the core of particular terms and what he (following Wittgenstein) calls agreement in judgments on their use. This is a point that yields support for the conclusion that Fish has missed something important when he describes Hart's invocation of the core as 'a strategy of desperation'. Moreover, what he has missed is not just the practical significance of Hart's exposition but of his own response to it. Fish's account of the concerns that unite interpretive communities, and the (underdeterminate) language in which they find expression, relates to the same fund of social capital that flickers into view in *The Concept of Law*. There are, to be sure, significant differences between Hart's exposition and Fish's response to it. Hart is alive to consensus (in the form of agreement in judgments). Fish places emphasis on conflict (the ways in which the members of an interpretive community use the linguistic resources they share to advance competing agendas).[183] However, when we combine their respective analyses, we can see how the language we have been considering is, at once, the fruit of cooperation and a site of and means to stabilise (or manage) conflict.

As well as throwing light on the powers of endurance exhibited by the legal system we are considering, this analysis also brings into sharp focus a distinction between Fish and Schmitt.

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[181] C. Harlow and R. Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 2009, 3rd edn) ch 14.

[182] D. Halpern, *Social Capital* (Cambridge: Polity Press, 2005) 2-3.

[183] While we can use a binary opposition between consensus and conflict to distinguish the respective contributions of Hart and Fish, there are other ways in which to bring out the differences between them. We might, for example, say of Hart that he is centrally concerned with semantics and cognition, while Fish focuses on rhetoric and plausibility. On semantics (and cognition) and rhetoric (and plausibility) as distinct 'domains' of language-related concern, see R. Geuss, *Changing the Subject: Philosophy from Socrates to Adorno* (Cambridge, MA: Harvard University Press, 2017) 258.

As we noted earlier, Schmitt argues that legal language is an empty vessel and that the will of an individual or a group yields the content it lacks. While will is at work in the interpretive communities Fish describes, they are also contexts in which reflection on meaning is strongly present. An interpretive community may breathe life into a particular term. But as it establishes this intersubjective reference point, it creates opportunities for its members to explore (change, reverse, transform) the range of meanings any such linguistic token may bear. This is a point we can press further by drawing on a recent meditation on language offered by the philosopher, Charles Taylor. Taylor argues that language draws us into a 'semantic' realm where we engage in processes of reflection that involve a 'gathering of attention'.[184] On Taylor's account, reflection makes it possible for people to hold particular matters in contemplation by dwelling on the significance of words that may or may not have relevance to them.[185] On this topic, he states that we often find ourselves in a 'zone' where our existing descriptions 'give out'.[186] However, he adds that any such zone is 'situated in a context of words'.[187] Consequently, we have at our disposal linguistic resources (spurs to reflection) that enable us to isolate objects within the 'stream of sensations' we experience.[188] These resources also make it possible for us to pick out features of the objects we contemplate that invest them with a distinct identity.[189] Here, it is crucial to recognise that Taylor is not talking about the apprehension of an abiding essence from an Archimedean platform that stands outside of context. He makes this clear when he argues that words (as components in a natural language) are the bearers of and draw those who use them into particular cultures that yield distinct forms of lived experience.[190] This is because words spur reflection in ways that give expression to a sense of 'aboutness' or 'intentionality' vis-à-vis the objects we apprehend that Fish would describe as 'context-specific'.[191] Taylor also argues that context-specific reflection on the model he describes develops in people a 'refined sense of human meanings' that embraces moral and other values.[192] Consequently, language propels people into normatively charged contexts (each of which yields a distinct 'mode of psychic life' or type of lived experience).[193] Moreover, Taylor applies this analysis to distinct 'language practices' within wider cultural contexts (or forms of life) that encompass them.[194]

The relevance of Taylor's analysis to the context we are considering is immediately apparent when we consider what Hart has to say about judicial decision-making and legal language.

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[184] C. Taylor, *The Language Animal*: *The Full Shape of the Human Linguistic Capacity* (Cambridge, Massachusetts: Harvard University, 2016) 9 and 11.
[185] *ibid*, 9 and 17.
[186] *Ibid*, 18.
[187] *ibid.*
[188] *ibid*, 12.
[189] *ibid*, 9-10, n 9 (drawing on J.G. Herder, 'Treatise on the Origin of Language' in M.N. Forster (trans), *Herder: Philosophical Writings* (Cambridge: Cambridge University Press, 2004) 87 (emphasis added) (on 'moment[s] of alertness' make it possible 'to dwell on a single image, pay it clear heed, … and separate off characteristic marks for the fact that this is *that object* and no other')). See also n 22 above (and associated text) (where Fish discusses the use of argument to build a 'this' rather than a 'that').
[190] *ibid*, 16-17 and 28.
[191] *Ibid*, 15.
[192] Taylor, n 184 above, 28.
[193] *Ibid*, 17.
[194] *Ibid.*

Hart's interest in 'the core' of legal language has to do with the pursuit of justice. He makes this clear when he identifies the core as yielding a basis for making analogical leaps into the penumbra when novel cases arise.[195] He notes that judges may be able to justify such leaps by reference to 'the central precept of justice' that we should '[t]reat like cases alike and different cases differently'.[196] More particularly, he gestures in the direction of two ideals of justice (corrective and distributive) that foster a context-specific sense of relevance.[197] While Hart offers this analysis with the aim of making a contribution to general jurisprudence, it instantiates a process of reflection on the practice- and culture-specific model Taylor describes. For the language on which Hart dwells serves justice-related ends that feature prominently in the modern municipal context we are considering (and others that are broadly similar to it).[198] Moreover, when a judge makes an analogical leap of the sort Hart contemplates, he or she is elaborating something that is 'already there'.[199] It takes the form of a practice that has ramified along a lengthy timeline and that constitutes a rich fund of social capital (in the form of an action-guiding 'context of words').[200]

In response to these points, Fish might talk of an 'agenda' that (through acts of will on the part of those who embrace it) inscribes itself on a new object. Such a response would underestimate language's power to draw people into webs of meaning (argument spaces) that can stabilise their behaviour more or less effectively because they are more of less normatively appealing. It would also undersell the richness of Fish's contribution (which throws light on interpretive communities as contexts in which underdeterminate language makes possible the accumulation of social capital). To place emphasis on an 'agenda' and the will that drives it forward is to offer a comparatively thin analysis that has obvious affinities with Schmitt's decisionism (understood as 'perfect "wilfulness"').[201] The thinness this analysis becomes apparent when we recognise that it reduces the character of the normative impulses at work in the politico-legal system we have been examining to just another will-driven agenda. This is a point we can press further by reference to the optimistic political anthropology that Schmitt identifies as informing liberal political philosophy. As we noted earlier, those liberals who think along the lines Schmitt describes repose confidence in legal language as a constraint. Taylor and Fish lend support to the view that are they right to do so. For legal language (in common with language generally) prompts us to reflect on its practical significance. If the resulting process of reflection leads us to conclude that legal rules and other norms serve our interests, we have a powerful incentive to treat them as authoritative. These points throw light on what we might

[195] Hart, n 61 above, 128-129.
[196] *ibid*, 163-164.
[197] *ibid*, 163.
[198] Hart's exposition has affinities with Fish's account of the way in which lawyers apprehend the facts and legal issues at stake in particular disputes through 'practice-informed' eyes and ears. See Fish n 7 above 387, and S.E. Fish, *Professional Correctness: Literary Studies and Political Change* (Oxford: Clarendon Press, 1993) 21.
[199] M. Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IN: Liberty Fund, 1997), 17.
[200] Taylor, n 184, above, 18.
[201] See n 86 above (and associated text). When Schmitt made his 'institutional turn', he recognised the importance of social capital in the form of 'a set of stable, reiterated, widespread social practices'. However, as his interest in this subject intensified, he identified a 'concrete order' as yielding 'a firm ground for a homogeneous political order'. In the context of the Third Reich, this meant that he staked out a position that served the end of ethnic homogeneity (*Artgleichheit*). See Croce and Salvatore, n 88 above, 53-54 and 73.

(at the very least) understand to be the prudential normative force of legal and political institutions in which liberal practical impulses find expression. However, this suggestion invites the response that all language is (on Taylor's analysis) a spur to reflection and such activity may be intense when it concerns matters in which people understand themselves to have an interest. This may be true. But if liberalism encourages the view that it is concerned with maintaining an environment in which all people have an interest (because it delivers security), it may possess uncommon normative appeal and powers of endurance.

When Fish describes liberal political philosophy as just another agenda, he deflects attention from this possibility. Dworkin brings us closer to it when he offers an account of intense disputes ('legal wars') that concern goods in which all people have an interest. His application of the term 'war' to these disputes is an indicator of the investment people (legal officials and other addressees of the law) make in them.[202] This analysis may also throw light on the agonised process of reflection that Hart went through while formulating a response to Dworkin's critique of his legal positivist statement of position in *The Concept of Law*. While Hart ultimately remained committed to the separability thesis, he gave serious consideration to abandoning it and embracing the idea that law and morality are necessarily related.[203] It may be that the temptation he felt, but resisted, to conclude that law's normativity is moral reflected the normative force exerted by the mature municipal legal systems that bulk large in his exposition. If this suggestion is correct, we can find in Hart lived experience that attests to a possibility that Fish is ill-equipped to bring into focus as a result of his use of the reductive (will-driven), homogenising term 'agenda'.

These are points that throw light on the relationship between law and politics in the context we have been considering. 'Law' and 'politics' prompt (on the analysis we have taken from Taylor) context-specific reflection on two complex and interrelated practices. 'Politics' is not simply about power (the ability to assert one's will in the face of resistance from others). Rather, it has to do with interest accommodation on an egalitarian model. This understanding of politics is, at once, substantive (egalitarian) and procedural (we must take account of all relevant, interests, claims and more general concerns). This gives law its *entrée*. For law establishes procedures that underwrite this understanding. This point also yields a basis on which to explain how law's normativity could take on a moral appearance. This is because the understanding of politics to which it gives expression has to do with securing the interests of all relevant people. Here we seem to have fastened on a cluster of considerations that throw light on how to establish a normatively appealing (because egalitarian) but not entirely safe (because contingent) space. It is a space that gives us means to accommodate the assertive, disputatious people who feature in the less optimistic contributions to political anthropology that Fish, Hart, and Hobbes offer. To this end, it makes extensive use of language (understood as an underdeterminate placeholder) that entangles people in words. It may be that a context

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[202] See Dworkin, n 124 above, 2. See also 10 (on the 'particularly profound' character of the disputes he describes).

[203] Hart, n 61 above 268, and N. Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2006) 348 ('But steady – no *wholesale* jettisoning of my "position". It looks as if the central concession is admission that law claims moral basis for conformity').

such as this gives us our best shot at a resilient but not entirely safe space. It certainly presents us with a chastened form of liberalism - alive to the imperfections of language and people.

CONCLUSIONS

In this response to *Winning Arguments* and Fish's other works, we have pointed up similarities between his critique of liberal jurisprudence and political philosophy and that of Carl Schmitt. Like Schmitt, Fish places emphasis on the deficiencies of legal language as a constraint on law's operations. We also find in his writings an emphasis on interpretive communities that bears some similarities to Schmitt's institutional turn (which features an invocation of collective will as a guide to judicial action). Fish again stakes out a position that has affinities with Schmitt when he dwells on 'the human condition'. Here, he presents an account of people as restless and assertive that has much in common with Schmitt's critique of the 'anthropological optimism' on display in liberal political philosophy. Fish's reflections on the human condition lead him to conclude that liberals who seek to establish a context that is free from disagreement hunger for a world that is unavailable to them. Schmitt offers a gruesome variation on the same theme in his account of friend-versus-foe politics. For he presents us with a world in which potentially lethal struggle between groups is a permanent feature of the practical scene.

Alongside these points, we must set others that bring into view significant differences between Fish and Schmitt. Fish seeks to offer what we might call a diagnosis of the human condition. Schmitt, by contrast, is a proponent of friend-versus-foe politics. On this matter, as on his more general critique of liberalism, Schmitt is unequivocal. There are, however, some signs of equivocation in Fish. When he talks of a 'final conflict' between those whose arguments bring them into collision, he sounds a Schmittian note. This is not, however, true, of his reflections on processes of 'change' and 'reversal'. 'Change' may carry us in the direction of a final conflict. But 'reversal' pulls us back from cataclysms of the sort that change may threaten or bring about. Moreover, 'change' and 'reversal' in combination seem to move us in the direction of inclusionary, egalitarian practical arrangements. This is because Fish holds out the prospect of an agenda going into abeyance while retaining some prospect of securing (at a later date) a position of social primacy. These points suggest that Fish's thinking may bear the traces of the liberalism against which he sets his face. But to the extent that there are intimations of liberalism at work in his thinking, it is very different from that on display in Ronald Dworkin. For it does not hold out the prospect of movement towards a just and enduring end-state or safe space.

The possibility that liberal assumptions may inflect Fish's thinking is not one that his emphasis on agendas encourages us to entertain. Rather, it suggests that he (like Schmitt) is a thinker who takes a bleak view of the human condition and is thus a dealer in what Michael Oakeshott called 'darkness'.[204] For he prompts us to consider not just argument but social life more generally as an incessant struggle at the base of which lies will. He also recognises that will,

[204] M. Oakeshott, *Hobbes on Civil Association* (Indianapolis, IN: Liberty Fund, 2000) 6.

as a force that expresses itself through argument, may lead us in the direction of 'large P politics' and the hard-edged exclusions it can bring in train. However, Fish's account of interpretive communities and the linguistic placeholders in which their concerns find expression lends plausibility to an alternative analysis of *Winning Arguments* and his other works. This analysis identifies interpretive communities and the linguistic resources they bring into existence as forms of social capital. Moreover, it draws strength from Charles Taylor's account of language as a spur to reflection on the impulses at work in particular cultures. Taylor tells us that reflection along the lines he describes will lead those who engage in it in particular directions. In response to this analysis, Fish might talk in terms of an array of agendas (each of which opens up practical possibilities that we can explain by reference to the theory-ladenness of fact). But to make such a response would be to flatten out important distinctions between particular directions of travel (and the types of lived experience they make possible). Some may be more attuned than others to considerations that make a social environment secure for all those who live within it. Where this is the case, the reasons for action these considerations yield may exert uncommon persuasive force on those who contemplate theme. Moreover, they may find in these reasons the stuff of what they consider to be truth. But, if they do, it is not truth independent of argument. For the reasons to which they are responsive and the interests to which they relate them are building blocks in arguments that have a context-specific or 'first-order' (and not Archimedean) character. This is a possibility to which our examination of British law has relevance. We found in this context understandings of 'law' and 'politics' that are the bearers of an egalitarian culture in which a commitment to security for all has a place. Moreover, these understandings seem to have shaped a politico-legal environment whose powers of endurance have to do with the persuasive force of the normativity at work within it. If those who inhabit such a space continue to make engaged responses to the demands it places on them, it can endure. But co-operative responses may not be forthcoming from the assertive, disputatious people who populate *Winning Arguments* and Fish's other writings. If we make the large anthropological assumption that these are the people who inhabit our legal and political institutions, we would be wrong to think we can take up residence in a politico-legal safe space.